

COMMISSIONERS
BOB STUMP – Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH



0000151372

ARIZONA CORPORATION COMMISSION

RECEIVED

DATE: FEBRUARY 25, 2014

2014 FEB 25 P 1:29

DOCKET NO.: W-03514A-12-0007

AZ 600266000000
DOCKET CONTROL

TO ALL PARTIES:

ORIGINAL

Enclosed please find the recommendation of Administrative Law Judge Dwight D. Nodes.
The recommendation has been filed in the form of an Order on:

J. ALAN SMITH V. PAYSON WATER CO., INC./BROOKE UTILITIES
(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the
Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the
Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

MARCH 6, 2014

The enclosed is NOT an order of the Commission, but a recommendation of the
Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been
scheduled for the Commission's Open Meeting to be held on:

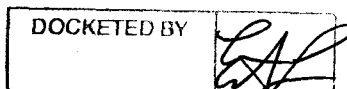
MARCH 11, 2014 and MARCH 12, 2014

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing
Division at (602) 542-4250. For information about the Open Meeting, contact the Executive
Director's Office at (602) 542-3931.

Arizona Corporation Commission

DOCKETED

FEB 25 2014



Jodi A. Jerich
JODI JERICH
EXECUTIVE DIRECTOR

1200 WEST WASHINGTON STREET; PHOENIX, ARIZONA 85007-2927 / 400 WEST CONGRESS STREET; TUCSON, ARIZONA 85701-1347

www.azcc.gov

This document is available in alternative formats by contacting Shaylin Bernal, ADA Coordinator, voice
phone number 602-542-3931, E-mail SABernal@azcc.gov.

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 BOB STUMP - Chairman
4 GARY PIERCE
5 BRENDA BURNS
6 BOB BURNS
7 SUSAN BITTER SMITH

8 J. ALAN SMITH,
9 COMPLAINANT,
10 VS.

11 PAYSON WATER CO., INC./BROOKE
UTILITIES, INC.,

12 RESPONDENT.

DOCKET NO. W-03514A-12-0007

DECISION NO. _____

ORDER

13 Open Meeting
14 March 11 and 12, 2014
15 Phoenix, Arizona

16 **BY THE COMMISSION:**

17 * * * * *

18 Having considered the entire record herein and being fully advised in the premises, the
19 Commission finds, concludes, and orders that:

20 **FINDINGS OF FACT**

21 1. On January 10, 2012, J. Alan Smith ("Complainant") filed with the Arizona
22 Corporation Commission ("Commission") a Formal Complaint ("Complaint") against Payson Water
23 Company, Inc. ("Payson Water" or "Company") and Brooke Utilities, Inc.

24 2. The Complaint alleges, among other things, that Payson Water overcharged its
25 customers for water hauling costs. According to the Complainant, Mr. Jim Pearson of Pearson
26 Transport/Pearson Water Company provided water hauling services to Payson Water during the time
27 that Payson Water is alleged to have overcharged its customers for water hauling costs.

28 3. On June 18, 2012, a Procedural Order was issued scheduling a hearing for August 7,
2012.

1 4. On July 19, 2012, the Commission's Executive Director signed a Subpoena Duces
2 Tecum ("Subpoena").¹ The Subpoena compelled the attendance of Jim Pearson at the hearing
3 scheduled on August 7, 2012.² The Subpoena also compelled Mr. Pearson to produce and provide
4 copies of certain documents, including water hauling invoices and logs, no later than ten (10) days
5 after the issuance of the Subpoena.³

6 5. The Subpoena states that "DISOBEDIENCE OF THIS SUBPOENA constitutes
7 contempt of the Arizona Corporation Commission and may subject you to further proceedings and
8 penalties under law, pursuant to A.R.S. § 40-424."⁴

9 6. On July 25, 2012, the Subpoena was served on Mr. Pearson.⁵

10 7. On August 1, 2012, the Complainant filed a Notice of Service of Process Subpoenas
11 on Jim Pearson and Pearson Water Company.

12 8. On August 1, 2012, the Complainant filed a Motion to Compel Jim Pearson and
13 Pearson Water Co. to Comply with Subpoenas. In that motion, the Complainant requested that the
14 Commission issue an order compelling compliance with the Subpoena, or, alternatively, that the
15 Commission impose sanctions for contempt in failing to comply with the Subpoena.

16 9. On August 7, 2012, the hearing in this matter was convened, and at which time the
17 Complainant requested a continuance of the hearing for 90 days.⁶ The Complainant indicated that he
18 had consulted with an attorney who had agreed to represent him in this complaint case, but the
19 attorney needed an additional 60 to 90 days to review the case file.⁷ Jim Pearson did not attend the
20 hearing as required by the Subpoena. In addition, the Complainant stated that Jim Pearson failed to
21 produce and provide the documents described in the Subpoena.⁸ The hearing was continued for 90
22 days, on the condition that the Complainant's attorney discuss with the other parties an alternative
23 hearing schedule and submit such schedule well before the 90 days were exhausted.⁹

24 ¹ See Attachment A (Administrative Subpoena Duces Tecum).

25 ² *Id.* at 1:17-20.

26 ³ *Id.* at 1:20-2:19.

27 ⁴ Attachment A, at 2:23-25.

28 ⁵ Attachment A, at 3.

⁶ Tr. (8/7/2012) at 18:12-16.

⁷ Tr. (8/7/2012) at 19:11-18.

⁸ Tr. (8/7/2012) at 10:11-11:9.

⁹ Tr. (8/7/2012) at 23:8-24:9.

1 10. On September 17, 2012, a Procedural Order was issued scheduling a procedural
2 conference for September 28, 2012.

3 11. On September 24, 2012, the Complainant filed a Motion to Initiate an Action in the
4 Superior Court to Compel Jim Pearson, Pearson Transport, Robert T. Hardcastle, Brooke Utilities,
5 Inc., and Payson Water Co. to Comply with the Subpoenas Served Upon Them. In that motion, the
6 Complainant indicated that Jim Pearson was refusing to comply with the Subpoena.

7 12. On September 28, 2012, a procedural conference was held, as scheduled, during which
8 discussions occurred regarding, among other things, the appropriate process for enforcing the
9 Subpoena previously served on Jim Pearson.¹⁰ Counsel for the Complainant entered an appearance
10 and indicated that he would attempt to contact Jim Pearson and request compliance with the
11 Subpoena.¹¹ The hearing was continued pending a status update from the Complainant regarding the
12 resolution of the Subpoena issue.¹²

13 13. On January 10, 2013, the Complainant filed a Notice of Submission of Demand for
14 Compliance with Subpoenas and Request for Issuance of Procedural Order Directing Compliance
15 Proceedings in the Superior Court. In that filing, the Complainant indicated that efforts to contact
16 Jim Pearson were unsuccessful and that Mr. Pearson had not produced the documents described in
17 the Subpoena.

18 14. On February 27, 2013, a Procedural Order was issued scheduling a procedural
19 conference for March 14, 2013 to discuss issues related to Commission enforcement of subpoenas.

20 15. On March 14, 2013, a procedural conference was held, as scheduled, during which
21 discussions occurred regarding available options for enforcing Jim Pearson's compliance with the
22 Subpoena. The Complainant requested the issuance of an order compelling compliance with the
23 Subpoena and requested that Staff contact Mr. Pearson to explain that order.¹³ Staff agreed to contact
24 Mr. Pearson to explain the order and request his compliance with the Subpoena.¹⁴

25 16. On March 20, 2013, an Order Compelling Compliance with Subpoena Duces Tecum

26 ¹⁰ Tr. (9/28/2012) at 5:1-14.

27 ¹¹ Tr. (9/28/2012) at 13:5-23.

28 ¹² Tr. (9/28/2012) at 13:17-18:4.

¹³ Tr. (3/14/2013) at 21:23-22:4.

¹⁴ Tr. (3/14/2013) at 20:1-21:2.

1 was issued ordering Jim Pearson to immediately provide copies of all documents in his possession
2 described in the Subpoena. It was further ordered that failure to comply may result in the issuance of
3 a contempt order by the Commission including the imposition of fines or other penalties as the
4 Commission may determine appropriate to enforce compliance with that order.

5 17. On April 12, 2013, Staff filed a status update indicating that Staff counsel had
6 contacted Jim Pearson and Mr. Pearson indicated "he had supplied all the documents in the related
7 Docket No. 12-0008." According to Staff, Mr. Pearson also stated that he misplaced some of the
8 responsive documents to the Subpoena and was trying to locate them. Staff counsel advised Mr.
9 Pearson to contact the Complainant.

10 18. On June 10, 2013, the Complainant filed a Renewed Motion to Compel Documents
11 and Information Requested by Subpoena and Data Requests and Motion for Order Requiring Jim
12 Pearson to Fully Respond to Subpoena Duces Tecum and Request for Hearing on Motions. In that
13 motion, the Complainant indicated the Jim Pearson had not produced the documents described in the
14 Subpoena.

15 19. On June 26, 2013, a Procedural Order was issued scheduling a procedural conference
16 for July 10, 2013, and ordering Mr. Pearson to provide copies of documents requested by
17 Complainant's counsel. It was further ordered that failure to comply may result in the issuance of a
18 contempt order by the Commission including the imposition of fines or other penalties as the
19 Commission may determine appropriate to enforce compliance with that order.

20 20. On July 10, 2013, the procedural conference was held, as scheduled. At the
21 procedural conference, counsel for the new owner of the Company entered an appearance and various
22 procedural issues were discussed, including discovery disputes between the Complainant and the
23 Company and the continued failure of Mr. Pearson to produce the documents described in the
24 Subpoena.¹⁵ At the conclusion of the conference, the parties were directed to attempt to resolve the
25 pending discovery disputes.¹⁶

26 21. On September 23, 2013, a Procedural Order was issued scheduling a procedural
27

28 ¹⁵ Tr. (7/10/2013) at 8:4-18.

¹⁶ Tr. (7/10/2013) at 15:15-19.

1 conference for October 7, 2013 and ordering the Company to be prepared to provide copies of all
2 documents requested by the Complainant and to make reasonable efforts to acquire the requested
3 documents alleged to be in the possession of Jim Pearson.

4 22. On October 1, 2013, a Procedural Order was issued vacating the October 7, 2013
5 procedural conference and resetting the same for October 24, 2013 due to a scheduling conflict with
6 counsel for the Company.

7 23. On October 9, 2013, a Procedural Order was issued vacating the October 24, 2013
8 procedural conference and resetting the same for October 30, 2013 due to a scheduling conflict with
9 counsel for Staff.

10 24. On October 30, 2013, a procedural conference was held, as scheduled, during which
11 discussions occurred regarding, among other things, the status of Mr. Pearson's compliance with the
12 Subpoena. Counsel for the Complainant stated that Mr. Pearson had still not produced and provided
13 the documents described in the Subpoena¹⁷ and requested that the Commission compel compliance.¹⁸
14 Counsel for the Complainant noted that the requested documents are "important enough to [this]
15 case" that "a huge amount of time and money in attorneys' fees" have been expended to pursue these
16 documents.¹⁹ Counsel for the Company represented that the Company has produced copies of all
17 documents in its possession that are responsive to the document requests of the Complainant.²⁰ At
18 the conclusion of the conference, the pending discovery motions were taken under advisement.

19 25. On November 12, 2013, counsel for the Complainant filed a Motion to Withdraw as
20 Counsel of Record with Client Approval. In the motion, counsel stated that the Complainant wished
21 to return to self-representation in this case.

22 26. On December 16, 2013, a Procedural Order was issued granting counsel for the
23 Complainant's Motion to Withdraw as Counsel of Record with Client Approval.

24 27. On January 29, 2014, the Complainant filed a Notice of Complainant's Fifth
25 Discovery and Disclosure ARCP Rule 26.1 and AAC Rule R14-3-109. In that filing, the
26

27 ¹⁷ Tr. (10/30/2013) at 4:7-8.

¹⁸ Tr. (10/30/2013) at 5:21-23.

¹⁹ Tr. (10/30/2013) at 4:25-5:3.

28 ²⁰ Tr. (10/30/2013) at 7:20-23.

1 Complainant noted, among other things, that Jim Pearson had still not complied with the Subpoena.

2 28. Jim Pearson failed to appear at the hearing held on August 7, 2012 as ordered by the
3 Subpoena. Accordingly, we find that Mr. Pearson is in contempt of the Commission for failing to
4 comply with the Subpoena.

5 29. Jim Pearson failed to produce and provide the documents as ordered by the Subpoena.
6 Accordingly, we find that Jim Pearson is in contempt of the Commission for failing to comply with
7 the Subpoena.

8 30. Jim Pearson failed to produce and provide the documents described in the Order
9 Compelling Compliance with Subpoena Duces Tecum issued on March 20, 2013. Accordingly, we
10 find that Jim Pearson is in contempt of the Commission for failing to comply with this order.

11 31. Jim Pearson failed to produce and provide the documents described in the Procedural
12 Order issued on June 26, 2013. Accordingly, we find that Jim Pearson is in contempt of the
13 Commission for failing to comply with this order.

14 32. We find that Mr. Pearson's disobedience with the Subpoena and subsequent orders of
15 the Commission, as discussed herein, is preventing the parties to this proceeding from having a full
16 and fair opportunity to present their cases. Accordingly, we believe that Jim Pearson should be
17 ordered to appear in person before the Commission and show cause to explain why his failure to
18 comply with the Subpoena and subsequent orders of the Commission does not constitute contempt
19 which would subject Mr. Pearson to fines and penalties pursuant to Article XV, section 4 of the
20 Arizona Constitution and A.R.S. § 40-424.

21 33. We note that Jim Pearson has been afforded ample time and multiple opportunities to
22 comply with the Subpoena and subsequent orders of the Commission. However, we believe that Jim
23 Pearson should have **one final opportunity to comply with the Subpoena.**

24 34. We find that the above described contempt proceeding against Jim Pearson shall cease
25 if Mr. Pearson complies with the following requirements:

- 26 a. Jim Pearson delivers copies of all documents in his possession described in the
27 Subpoena, to the Complainant, within thirty (30) days of the effective date of
28 this Decision. Copies of all such documents shall **be filed** with the Arizona

1 Corporation C ommission's Docket Control Center, **1200 West Washington**
2 **Street, Phoenix, Arizona 85007, and mailed** to the Complainant's address, **J.**
3 **Alan Smith, 600 S. Oak St., Space #4, Payson, Arizona 85541; and**

- 4 b. If Jim Pearson does not possess one or more of the subpoenaed documents, he
5 shall file with Docket Control an affidavit avowing that he does not possess
6 such document(s) within thirty (30) days of this Decision. The affidavit must
7 clearly identify which document(s) Mr. Pearson does not possess and explain
8 why the document(s) are not in his possession

9 35. We further find that if Jim Pearson complies with the requirements set forth in
10 Paragraph 33 of the Findings of Fact, Mr. Pearson does **not** need to appear and show cause, as
11 discussed herein. In that event, we direct the Hearing Division to vacate the above described
12 contempt proceeding.

13 CONCLUSIONS OF LAW

14 1. The Commission has jurisdiction to hear complaints against public service
15 corporations pursuant to A.R.S. § 40-246.

16 2. Payson Water Company, Inc. is a public service corporation as defined by Article XV,
17 section 2 of the Arizona Constitution.

18 3. The Commission has jurisdiction over the subject matter of the complaint in this
19 matter.

20 4. Under Article XV, section 4 of the Arizona Constitution, the Commission "shall have
21 the power of a court of general jurisdiction to **enforce the attendance of witnesses and the**
22 **production of evidence by subpoena**, attachment, and punishment."

23 5. A.R.S. § 40-424(A) provides that "[i]f any corporation or person fails to observe or
24 comply with any order, rule, or requirement of the commission or any commissioner, the corporation
25 or person shall be in **contempt** of the commission and shall, after notice and hearing before the
26 commission, be **fin**ed by the commission in an amount **not less than one hundred nor more than**
27 **five thousand dollars**, which shall be recovered as penalties."

28 6. It is lawful and in the public interest to schedule a hearing for Jim Pearson to appear

1 before the Commission and show cause as described herein.

2 **ORDER**

3 IT IS THEREFORE ORDERED that **Jim Pearson** shall appear in person and show cause
 4 before the Commission on **April 21, 2014, at 10:00 a.m.**, or as soon thereafter as is practical, at the
 5 Commission's offices, 1200 West Washington Street, **Hearing Room No. 1**, Phoenix, Arizona
 6 85007, to explain:

- 7 a. Why his failure to comply with the Subpoena Duces Tecum signed by the
 8 Commission's Executive Director on July 19, 2012, and served on Mr. Pearson
 9 on July 25, 2012, as discussed herein, does not constitute contempt of the
 10 Commission;
- 11 b. Why his failure to comply with the Order Compelling Compliance with
 12 Subpoena Duces Tecum issued on March 20, 2013, as discussed herein, does
 13 not constitute contempt of the Commission;
- 14 c. Why his failure to comply with the Procedural Order issued on June 26, 2013,
 15 as discussed herein, does not constitute contempt of the Commission;
- 16 d. Why the Commission should not impose fines and penalties pursuant to Article
 17 XV, section 4 of the Arizona Constitution and A.R.S. § 40-424 for each
 18 instance of contempt described above; **and**
- 19 e. Why other relief deemed appropriate by the Commission should not be
 20 ordered.

21 IT IS FURTHER ORDERED that **Jim Pearson** does **not** need to appear and show cause, as
 22 ordered above, if he complies with requirements set forth in Paragraph 33 of the Findings of Fact. In
 23 that event, we direct the Hearing Division to vacate the above ordered hearing.

24 ...

25 ...

26 ...

27 ...

28 ...

1 IT IS FURTHER ORDERED that failure to comply with this Decision may result in the
2 imposition of fines and penalties pursuant and/or other relief as the Commission may determine
3 appropriate to enforce compliance with this Decision.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 **BY ORDER OF THE ARIZONA CORPORATION COMMISSION**

6
7
8 CHAIRMAN _____ COMMISSIONER _____

9
10 COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER _____

11
12 IN WITNESS WHEREOF, I, JODI JERICH, Executive
13 Director of the Arizona Corporation Commission, have
14 hereunto set my hand and caused the official seal of the
Commission to be affixed at the Capitol, in the City of Phoenix,
this _____ day of _____ 2014.

15
16 JODI JERICH
17 EXECUTIVE DIRECTOR

18 DISSENT _____

19
20 DISSENT _____
21 DDN:ru

1 SERVICE LIST FOR:

J. ALAN SMITH V. PAYSON WATER CO.,
INC./BROOKE UTILITIES

2
3 DOCKET NO.:

W-03514A-12-0007

4 Jim Pearson

Pearson Transport/Pearson Water

5 1120 Rodeo Rd.

PO Box 193

6 Williams, AZ 86046-0193

(SERVICE BY CERTIFIED AND REGULAR U.S. MAIL)

7 J. Alan Smith

8 600 S. Oak St., Space 4

9 Payson, AZ 85541

Jay L. Shapiro

10 FENNEMORE CRAIG, P.C.

2394 East Camelback Rd., Suite 600

11 Phoenix, AZ 85016

12 Attorneys for Payson Water Company

Janice Alward, Chief Counsel

13 Legal Division

ARIZONA CORPORATION COMMISSION

14 1200 West Washington Street

15 Phoenix, AZ 85007

Steve Olea, Director

16 Utilities Division

ARIZONA CORPORATION COMMISSION

17 1200 West Washington Street

18 Phoenix, AZ 85007

ATTACHMENT A

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

GARY PIERCE- Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

IN THE MATTER OF

J. Alan Smith
Private Citizen, injured party,

Complainants,

vs.

PAYSON WATER CO. INC./BROOKE
UTILITIES INC.

Respondents.

DOCKET NO. W-03514A-12-0007

**ADMINISTRATIVE
SUBPOENA DUCES TECUM**

TO: JIM PEARSON
PEARSON TRANSPORT/PEARSON WATER
P.O. Box 193
1120 Rodeo Rd.
Williams, Arizona 86046
(928) 635-4220; (928) 853-4755

YOU ARE HEREBY COMMANDED, pursuant to A.R.S. §§ 40-241, 40-244, A.A.C. R14-3-109 and Ariz. R. Civ. P. 30 and 45 to appear at the **Hearing scheduled for August 7, 2012 at 10:00 a. m.** at the offices of the Commission, Hearing Room No. 1, 1200 West Washington St., Phoenix, Arizona 85007 and to produce and provide no later than Ten Days (10) after receipt of this Subpoena copies of the following documentation to the Complainant; J. Alan Smith; 8166 Barranca Road; Payson, Arizona 85541 in connection with the administrative proceedings in the above captioned action and as follows:

1. Any and all copies of the Books, papers, documents or other tangible things, Accounts, Water Hauling Invoices, Water Hauling Logs, Bills of Lading, Waybills, and other documents unedited and un-altered that have been billed to Brooke Utilities, Inc. and Payson Water Co. Inc. P. O. Box 8218; Bakersfield, CA 93380 according to Invoices issued by **Pearson Water Co.** for the hauling of water to the Water Systems of Mesa del Caballo, East Verde Park and any

other Water System owned and operated by Payson Water Co. during Water Augmentation period May 1, 2011 through October 31, 2011 inclusive of those billing periods and all those Water Hauling Invoices, Water Hauling Logs, Bills of Lading, Waybills and other documents associated therewith and described herein, including but not limited to the following:

- a. Invoice Numbers 8803, 8804, 8805, 8806, 8807, 8808, 8809, 8810, 8811, 8812, 8813, 8814, 8815, 8816, 8817, 8818, 8819, 8820, 8821, 8822, 8823, 8824 and 8825 and any and all of the BUI HAULING LOGS and your records associated with these invoices. They shall be copies of the originals un-altered and un-edited in any way;
- b. Copy of any contract between Pearson Water Co. and Payson Water Co. or Brooke Utilities Inc. to haul water from any location to any other location and particularly from any location to any of the Water Systems owned and operated by Payson Water Co.
- c. Disclose the locations of where any amount of water was acquired and hauled from whether it was the Town of Payson or any other source to the East Verde Park Water System or any other location during the Augmentation Period of May 2011 to October 2011;

YOU HAVE BEEN SUBPOENED BY: J. Alan Smith

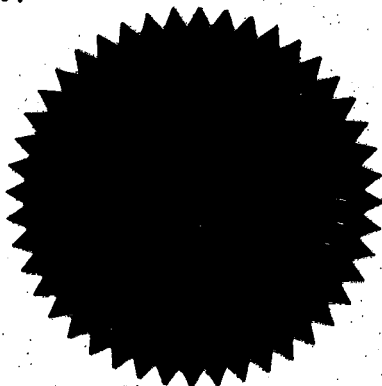
8166 Barranca Rd.

Payson, Arizona 85541

Telephone: (928) 951-2083

DISOBEDIENCE OF THIS SUBPOENA constitutes contempt of the Arizona Corporation Commission and may subject you to further proceedings and penalties under law, pursuant to A.R.S. § 40-424.

Given under by hand the seal of the Arizona Corporation Commission this, 19th day of July, 2012.




Ernest G. Johnson, Executive Director
Arizona Corporation Commission

Persons with a disability may request a reasonable accommodation such as a sign language interpreter, as well as request this document in an alternative format, by contacting Shaylin A. Bernal, Executive Assistant to the Executive Director, voice phone number 602-542-3931, e-mail sabernal@azcc.gov. Requests should be made as early as possible to allow time to arrange the accommodation.

CERTIFICATE OF SERVICE

The undersigned swears (or affirms) that he/she is qualified to serve this subpoena and that he/she did so by showing the original to and informing the witness of its contents and by delivering a copy thereof to him at 7:36 a.m./p.m. on July 25, 2012 **PEARSON WATER CO.**; at **1120 Rodeo Rd. Williams, Arizona 86046.**

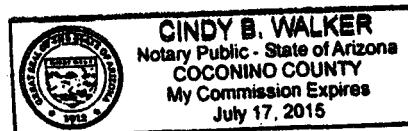
#W-03514A-12-0007

Debi Woskobojnik
Person Serving Subpoena
Debi Woskobojnik

Subscribed and sworn to before me on July 26, 2012

Cindy B Walker
Notary Public

July 17 2015
My Commission Expires



3

Persons with a disability may request a reasonable accommodation such as a sign language interpreter, as well as request this document in an alternative format, by contacting Shaylin A. Bernal, Executive Assistant to the Executive Director, voice phone number 602-542-3931, e-mail sabernal@azcc.gov. Requests should be made as early as possible to allow time to arrange the accommodation.

DECISION NO. _____